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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 271

UNITED STATES OF AMERICA, *Appellant*

v.

ALUMINUM COMPANY OF AMERICA AND
ROME CABLE CORPORATION

On Appeal From the United States District Court for the Northern District of New York

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Aluminum Company of America and Rome Cable Corporation move that the judgment and order of the district court be affirmed.

STATEMENT

This is a direct appeal from a final order of the district court approving the sale of Rome Cable Corporation ("Rome") to The Okonite Company ("Okonite"), a subsidiary of Ling-Temco-Vought, Inc. ("LTV"). The challenged divestiture is complete and

unqualified, with Alcoa retaining no equity, debt, security or other interest in any part of the Rome assets (J.S. 2a).[1] The Government's appeal raises two questions: first, whether the court should have approved the sale at this time in view of alleged actual and potential competition between Rome and Okonite (J.S. 8-20); and second, whether the district court's decree, pursuant to which the challenged sale was made, was an appropriate divestiture order (J.S. 21-24). It is appellees' position that the decree and the divestiture ultimately approved effectively redress the violation found by this Court and fall well within the discretion entrusted to courts of equity in fashioning equitable relief in the public interest.

In *United States* v. *Aluminum Company of America*, 377 U.S. 271, 281 (1964), this Court held that Alcoa's acquisition of Rome violated Section 7 of the Clayton Act and remanded the case for divestiture proceedings in conformity with its opinion. Pursuant to this mandate, the district court held two evidentiary hearings[2] which led to (1) the entry of a final judgment patterned, with important exceptions, after the final judgment entered by consent in the case of *United States* v. *Kaiser Aluminum & Chemical Corp.*, Civil No. 2795 (D.R.I.); and (2) an order approving the sale of Rome to Okonite. These relief proceedings, and the district

[1] The district court's Memorandum Decision and Order approving the sale of Rome to Okonite is set out as Appendix A to the Government's Jurisdictional Statement (J.S. 1a-15a). The court's earlier Memorandum Decision and Order adopting the Final Judgment herein appears in Appendix B (J.S. 16a-28a). The Final Judgment itself is set out at J.S. 28a-35a.

[2] The transcript of the first relief hearing, held October 4-7, 1965, will be referred to as "Tr. I"; the transcript of the second relief hearing, held November 2-4, 1966, will be referred to as "Tr. II."

court's findings and orders based thereon, provide the background for this appeal.

1. The Proceedings Relating to the Final Judgment

In the first relief proceedings, defendants urged that in the circumstances of this case it would be appropriate to adopt a divestiture decree similar to the decree previously accepted by the Government in the *Kaiser* case, *supra*.[3] This proposal, referred to as the "Kaiser Plan," contemplated a sale of Rome within a period of nine months at not less than an "upset" price to be computed on the basis of the adjusted book value of the Rome assets, including all land, plants, equipment, inventories, and work progress.[4] It was further provided, as in the *Kaiser* judgment, that upon a determination by the district court that Alcoa had made a *bona fide* but unsuccessful effort to dispose of Rome, it would be relieved of any further obligation to sell (*id.*). This full retention provision was rejected by the court (J.S. 23a), and is not properly involved in this appeal.[5]

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[3] In addition, the defendants presented, as an alternative, a plan of partial divestiture under which Triangle Conduit & Cable Co., previously only a manufacturer of copper wire and cable products, would acquire all of Rome's equipment, technical know-how, good will, customer lists, etc. associated with the manufacture and sale of the aluminum conductor products manufactured by both Alcoa and Rome prior to the merger, and Alcoa would be restrained from the manufacture of such products in the Rome plant. The effect of such plan, had it been adopted, would have been to give to Triangle a role in the aluminum conductor market substantially identical to that formerly served by Rome and to leave Alcoa in possession of the Rome facilities used and useful in the manufacture of products not previously made by Alcoa, and as to which, therefore, the merger had not increased concentration. The district court rejected the Triangle plan (J.S. 22a).

[4] Proposed Final Judgment submitted by defendants, February 25, 1966.

[5] *But see* J.S. 24, and discussion *infra*, p. 27.

The evidence in the first relief hearing showed that Rome's wire and cable earnings had dropped by nearly $3 million from March 1957 to March 1958, that by the end of March 1959, when the acquisition occurred, Rome's wire and cable operations were already losing money, and that in the five years 1960 through 1964, Rome's wire and cable losses totalled more than $15 million, with a loss in 1961 alone of more than $4.2 million.[6] These losses, concededly, were not due to any mismanagement by Alcoa (J.S. 26a-27a), but were the result of an industrywide depression from which other wire and cable fabricators had also suffered (J.S. 26a; see DXR 11).[7] The uncontradicted testimony of experienced businessmen and labor and community leaders indicated widespread concern for the economic future of Rome (J.S. 27a, Tr. I, 473-75, 502, 513, 517). Thus, the record demonstrated

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[6] Rome's earnings and loss record, broken down among wire and cable, conduit and accessory products, from 1956 through the first half of 1965, is shown in DXR 9, from which the following tabulation of wire and cable earnings and losses is abstracted:

ROME PLANT (Wire and Cable) EARNINGS AND LOSSES

1956 (3/31/57)	$3,791,977	1961 (Cal. Year)	(4,231,128)
1957 (3/31/58)	844,680	1962	(3,843,419)
1958 (3/31/59)	(347,279)	1963	(3,731,189)
1959 (12/31/59)	(200,511)	1964	(794,387)
1960 (Cal. Year)	(2,461,975)	1965 (6 months)	1,201,477

Earnings and losses for Rome as a whole followed a generally similar pattern.

[7] As Judge Dawson found in United States v. Kennecott Copper Corporation, 231 F. Supp. 95, 104 (S.D.N.Y. 1964): "Since 1958, insulated wire and cable have been continuously falling due to overcapacity. This has been an industry-wide situation except for paper insulated power cable. Meanwhile the price of copper has remained relatively stable. Profit margins on insulated wire and cable have therefore dwindled so that many companies are now showing losses."

the desirability of a decree that would tend to assure a new ownership for Rome ready and able to maintain and improve its operations (J.S. 5a, 26a).[8] As the court concluded,

> The ultimate objective to be attained is the restoration of Rome under an ownership which intends to continue its operation in the future as an active competitor in the sale of the products which it manufactures (J.S. 24a).

The above-mentioned *Kaiser* judgment, to which the court referred in framing its decree, arose out of the Government's attack on Kaiser's 1957 acquisition of the Bristol, Rhode Island, plant of U. S. Rubber, an acquisition which this Court found was "specifically identified as [one of the] factors influencing Alcoa's 1959 decision to acquire Rome."[9] *United States* v. *Aluminum Company of America, supra,* 377 U.S. at 279, note 6.

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[8] While Rome has been profitable since 1965, the record shows that this was due to increased defense procurement and a shortage of copper, unusual market conditions that are not expected to last indefinitely (J.S. 5a; Tr. I, 93-94, 389, 517, 524, 530; Tr. II, 200-01).

[9] The district court found, and the record plainly shows, that the Government itself had "asserted in unequivocal language that the Kaiser acquisition 'fostered' several similar acquisitions, including the acquisition of Rome by Alcoa"; that the Government had conceded that "Rome was approximately the same size as the company acquired by Kaiser which, like Rome, 'was one of the leading nonintegrated fabricators of aluminum and other kinds of wire and cable'"; that Alcoa ranked second to Kaiser in the insulated and covered aluminum wire and cable field; and that because of the substantial factual and legal identity of the two cases, it was "not unlikely that the Supreme Court decision in the instant case afforded the motivation for the consent decree under discussion" (J.S. 24a-26a).

The record shows that after this Court's decision in the present case, the Antitrust Division was informed that an order of divestiture in the *Kaiser* case might threaten the continued existence of 700 jobs in the already depressed Bristol area. The Division assured Rhode Island officials that "the Government will under no circumstances urge relief in this case which would result in the closing of the plant" (DXR 3). Thereafter, the Government entered into a consent judgment having two key features: a minimum or "upset" price below which Kaiser was not required to sell, and an automatic retention provision which permitted Kaiser to retain the plant if, despite a *bona fide* attempt to do so, it was unable to make a sale (DXR 4).

The district court, while recognizing that "generally speaking, judgments based upon the consent of the litigants have little, if any, probative force in subsequent litigation involving a different defendant," found in this case "such a similarity of facts as to warrant the consideration of the Kaiser judgment in exercising the equitable obligations imposed upon the court" (J.S. 24a).[10] Upon such consideration, however, the court rejected the automatic retention provision of the Kaiser Plan "since such provision permits the offending party to retain the competitive advantage the acquiring of which has been held to be in violation of the statute" (J.S. 23a),

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[10] In addition to the substantial identity of the two cases on the merits (note 9, *supra*), the court found that economic conditions in the Bristol, Rhode Island and Utica-Rome communities were also "strikingly similar," with both areas having been classified by the United States Government as depressed labor areas (J.S. 25a).

Accordingly, the court ordered "total divestiture" (J.S. 27a), directing Alcoa in good faith to sell the Rome business and assets within a period of six months to an eligible purchaser. The court reserved for further consideration both an extension of this initial divestiture period and the possible "application of other remedies or types of divestiture in the event that no purchaser, dedicated to the continuance of Rome as an active competitor, is found" (J.S. 27a-28a, 31a). The "upset" price feature of the Kaiser Plan was retained, but with express qualifications. As the court held (J.S. 24a):

> It is not intended . . . that Alcoa should automatically reject any and all purchase offers which do not meet the upset price. The provision in the present judgment is intended to eliminate speculators but not to automatically exclude purchasers showing an ability and an intention to continue Rome as an active competitor in its field.

2. The Proceedings Relating to Approval of the Okonite Sale

As required by the judgment (J.S. 32a), Alcoa prepared a brochure describing the Rome properties and soliciting purchase offers (DXR 50). This brochure was distributed to 153 persons, firms, and corporations (Tr. II, 49; GX 811). At least 32 of those contacted expressed a further interest in the purchase, and, after appropriate follow-up, negotiations were carried forward with 19 firms (Tr. II, 52), of which five (including LTV) either made or were prepared to make offers (Tr. II, 54, 61-63, 65-69, 72-78). The terms proposed by four of the prospective purchasers involved retention by Alcoa of substantial debt or equity interest in Rome (*id.*), amounting in some cases

to potential working control (Tr. II, 190-192).[11] Only LTV, on behalf of its Okonite subsidiary, offered to purchase Rome on an all-cash basis.

On October 13, 1966, defendants petitioned the district court for approval of the sale of Rome to Okonite. After full discovery by the Government and an evidentiary hearing, the district court on December 21, 1966, rendered its memorandum decision and on January 20, 1967, entered its final order approving the sale (J.S. 1a-15a).

The court pointed out that Alcoa's acquisition of Rome had been found by this Court to violate Section 7 of the Clayton Act only with respect to the aluminum conductor line of commerce (J.S. 6a). Finding Okonite to be neither an actual nor a significant potential manufacturer of aluminum conductor products (J.S. 6a, 9a), the court ruled that "the anti-competitive effects fatal to the Rome-Alcoa merger will be entirely eliminated under the proposed plan" (J.S. 6a).

Recognizing the existence of some overlap between the copper wire and cable products of the two companies, the court found, however, that such overlap occurred in only four of ten Census product classifications and that in three of those categories the extent of overlap was minimal (J.S. 7a-8a). As to the fourth classification, power wire and cable, the court ruled that any overlap there was more theoretical than real since "Okonite's three largest products [in that category]

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[11] Typical of these offers was the Universal American Corporation's proposal to finance the purchase of Rome by issuing to Alcoa $10 million worth of a Universal non-convertible preferred stock, with the balance of the price—some $23 or $24 million—to be secured by subordinated 6 per cent debentures in the New Rome Cable Corporation (Tr. II, 62-63).

account for about eighty-three percent of its total power cable shipments, none of which is manufactured by Rome" (J.S. 8a). The court concluded that "the overlap products manufactured by Rome and Okonite are insignificant competitive factors as between the two organizations" (*id.*).

As to potential competition, the court rejected as "directly contrary to the evidence produced" (J.S. 9a) any contention that either Rome or Okonite is "'waiting anxiously'" to enter the markets of the other (J.S. 9a-10a). Detailing the historically different product orientations of the two companies (J.S. 7a, 9a) and referring to the financial barriers to internal expansion (J.S. 10a), the court held (*id.*): "Here there is no evidence that in the foreseeable future either Rome or Okonite plans to or is capable of entering a product field other than it now occupies."

Noting that the Government had avoided any contention that the sale of Rome to Okonite would violate the antitrust laws (J.S. 11a), and taking into account the financial insecurity of Rome (J.S. 5a) and the detriment to its viability of further delay (J.S. 11a), the court found not only that there were no more than minimal anti-competitive implications but that there were affirmative benefits. The court concluded (J.S. 11a):

> The offer made constitutes a clear, clean and complete divestiture by Alcoa of Rome's assets. It obviates many, if not most, of the objections which are generally advanced in similar proceedings. It eliminates the unrest among Rome's personnel and assures them of a strong aggressive employer who has given assurance as to the continuance of Rome's presently located three manufacturing

plants. It should tend to stop Rome's loss of technical help to other employers and restore a sense of security which, understandably, has been missing since the order of divestiture. The benefit to be obtained by the closing of this litigation at this time would seem to far outweigh any speculative advantage which would result from further delay.

ARGUMENT

The Government does not claim that the proposed sale would violate Section 7 or even that Okonite is disqualified as a purchaser of Rome "under all conceivable circumstances" (J.S. 11, note 8). It claims, rather, that the district court should have withheld its approval pending a further search for "more satisfactory alternatives" (*id.*). As expressed in the district court, it is the Government's position that "competitive problems are sufficiently likely that [the court] should not *at this time* approve the proposed sale . . . but should require Alcoa to continue its attempt to sell Rome to a *more acceptable* purchaser.[12]

The court found, however, that the "competitive problems" cited by the Government[13] were not substantial and that the positive benefits of the proposed sale "far outweigh any speculative advantage which would result from further delay" (J.S. 11a). The benefits noted by the court included, in particular, the com-

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[12] Memorandum in Opposition to Defendants' Petition for Approval of its Proposed Plan of Disposal, p. 13 (emphasis added).

[13] Such problems relate solely to alleged actual and potential competition between Rome and Okonite. The Government made no objection based on the business activities of LTV, Okonite's parent company (Tr. II, 504).

plete elimination of the violation found by this Court in the aluminum conductor line of commerce, the immediate transfer of Rome to strong ownership committed to the continuance of Rome as a viable competitor, and, not least, the termination of the litigation itself. The court's determination, we submit, reflects a balanced, practical assessment of the mix of facts before the court and raises no question of general importance for the administration of the antitrust laws requiring plenary consideration by this Court.

I

THE SALE OF ROME TO OKONITE WOULD CONSTITUTE COMPLETE AND EFFECTIVE EQUITABLE RELIEF IN THE PUBLIC INTEREST

The test of equitable relief is whether it is "effective to redress the antitrust violation proved." *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 323 (1961). Here, there is no dispute that the proposed sale, unlike the relief initially formulated in *duPont*, would accomplish complete, absolute and unqualified divestiture, with Alcoa retaining no vestige of interest in Rome. This much the Government concedes (J.S. 9).

It is likewise undisputed that Okonite does not manufacture aluminum conductor products (DXR 60). Hence, upon divestiture, Rome-Okonite would succeed to the role formerly occupied by Rome as a nonintegrated aluminum conductor fabricator. Indeed, since Okonite will bring greater financial and other resources to Rome, the combination is likely to be a stronger, more vital independent force in the aluminum conductor market than was premerger Rome (*see infra*, pp. 22-23). In short, the proposed sale irrevocably

breaks up the Alcoa-Rome merger and returns a strong independent to the aluminum conductor market.

The Government objects, however, that the proposed sale would merely substitute "the merger of an actual and a potential competitor for the merger of two actual competitors . . ." (J.S. 15). This is a captious objection, for it is completely unrealistic to compare Okonite's alleged potential competition with Alcoa's position as the leading *actual* producer of aluminum conductor. In any event, the district court, applying the criteria spelled out in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), and recognizing "that potential competition cannot be put to a subjective test" (J.S. 9a), rejected the Government's contention that Okonite is a significant potential competitor in the aluminum conductor field (*id.*).

The record unequivocally supports the court's conclusion. One salient fact, totally ignored by the Government, is that the aluminum conductor market is pre-eminently an *overhead* product market; as this Court noted, "[W]hile aluminum conductor dominates the overhead field, copper remains virtually unrivaled in all other conductor applications." *United States* v. *Aluminum Company of America, supra,* 377 U.S. at 274, 277. Okonite's production, however, has traditionally been confined to sophisticated high-voltage copper products used in underground and inside applications (J.S. 7a). Okonite has never made overhead products, and there is no evidence, and the Government does not contend, that it either desires or is under market pressure to shift from its traditional high-voltage, underground orientation to the manufacture of overhead products (*See e.g.*, Tr. II, 304-06). It is irrelevant that Okonite is contemplating the use of alumi-

num in certain underground applications (J.S. 15), since "aluminum's brittleness and larger size render it impractical"[14] in such applications. Thus, even if Okonite were to start using aluminum in underground products, this would not place it in the mainstream of aluminum conductor competition.[15]

Significant gaps in Okonite's aluminum conductor technology (J.S. 3a), its prior unsuccessful experience with aluminum conductor (*id.*), and its lack of acceptance in the market place as an aluminum conductor supplier (Tr. II, 401-02), all further substantiate the court's conclusion that Okonite does not satisfy the potential competition indicia outlined by this Court in *Penn-Olin*. In this connection, it is especially significant that Okonite, unlike premerger Rome, has no aluminum rod-making capability (Tr. II, 306, 332-34). This lack, as the Government has stressed in earlier phases of this proceeding, would place Okonite at a significant competitive disadvantage relative to integrated and semi-integrated fabricators having an aluminum rod technology.[16]

Moreover, while the primary objective in formulating relief is to redress the violation proved, courts are admonished to accomplish "this result with as little injury as possible to the interest of the general

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[14] United States v. Aluminum Company of America, *supra*, 377 U.S. at 277.

[15] As the Government showed in the trial on the merits, all of Alcoa's and upwards of 90 per cent of most other producers' aluminum conductor production was in the overhead field (GX 443, R. 2728).

[16] *See, e.g.*, Post-Trial Brief of the United States, p. 29.

public."[17] Thus, while here the court was concerned primarily with the proposed sale's remedial effects in the aluminum conductor field and its lack of significant adverse effect in other segments of the wire business (*See, infra*, pp. 16-23), it was also mindful that the interest of the general public would be served by approving the proposed sale at this time.

As noted, the court was concerned with the need to assure Rome's survival as a viable competitor.[18] In this regard, it was well satisfied that LTV and Okonite had the resources and intention "to maintain and expand [Rome's] position as a competitor in the market available to its products" (J.S. 4a). On the other hand, other firms that had expressed interest in Rome did not possess comparable managerial and financial resources (Tr. II, 79, 181, 191).

In addition, the court deemed it desirable to bring this litigation to a close without further delay. The record showed that because of uncertainty as to its future ownership, Rome was losing key employees, including sales managers, engineers, and research technicians, and was experiencing difficulty in hiring replacements for those who left and in recruiting new professional personnel (Tr. II, 104, 198-99). The court concluded that further delay would be "detri-

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[17] United States v. American Tobacco Co., 221 U.S. 106, 185 (1911), quoted in United States v. E. I. duPont de Nemours & Co., *supra*, 366 U.S. at 327-28.

[18] As to the appropriateness of such concern, see United States v. Continental Can Co., Inc., 1964 Trade Cases ¶ 71,264, p. 80,140 (S.D.N.Y. 1964), where the court noted that in circumstances similar to those of this case, the Government had conceded that the sale of the plants "without assurance of their continued full operation on a sound basis . . . would not be in the public interest and should not be directed by the Court."

mental to Rome's viability," whereas approval of the plan at this time "should tend to stop Rome's loss of technical help to other employers and restore a sense of security which, understandably, has been missing since the order of divestiture" (J.S. 11a).

There was, moreover, a real question whether further effort to sell Rome would have produced a "more eligible" purchaser than LTV-Okonite. As noted earlier, the availability of Rome was widely publicized, and negotiations were conducted with 19 firms, yet only five made or indicated their willingness to make an offer for Rome. Of these, the only all-cash proposal was by LTV, with each of the other four involving retention by Alcoa of a substantial interest in the new Rome organization. At the hearing, the court inquired if the Government would "not object to Alcoa holding stock in the purchaser," because if it would not, then "we could turn to somebody else besides this Okonite" (Tr. II, 172-73). Government counsel declined to state that the Government would approve a transaction in which Alcoa was left with an ownership position in the purchaser (*id.*). Thus, the court was justified in concluding that any future sale was likely to involve an incomplete divestiture of the type specifically condemned by this Court in the *duPont* case and, more recently, by the district court in *United States* v. *Aluminum Company of America and Cupples Products Corporation*, 257 F. Supp. 466 (E.D. Mo. 1966).

In sum, therefore, the court had before it a proposed divestiture that was complete and unqualified, that tended to assure the economic survival of Rome, and that, above all, effectively redressed the violation proved in the aluminum conductor field.

II

ALLEGED ANTICOMPETITIVE SIDE EFFECTS IN THE WIRE AND CABLE INDUSTRY DO NOT BAR THE PROPOSED SALE OF ROME TO OKONITE

As noted (*supra*, p. 10), the Government has not claimed even the reasonable probability of anticompetitive effect condemned by the Clayton Act, and has not foreclosed the eventual sale of Rome to LTV-Okonite. The Government's inability to claim illegality must be assumed to reflect a well-considered analysis of the case, for it had the proposed sale under study for nearly three months preceding the hearing and through prior litigation involving both Rome and Okonite was "well acquainted not only with the wire and cable industry as a whole but with the output of the facilities and the market status of the two corporations" (J.S. 11a). The Government's failure to claim illegality or to interpose any irrevocable opposition to the proposed sale reflects the fact that the claimed anticompetitive effects are not substantial.

The Government now claims that "Rome and Okonite were substantial producers of wire and cable, ranking eighth and ninth in the field . . ." (J.S. 16). In district court, however, the Government conceded that Okonite and Rome are "small in the wire and cable industry" and that both are "much smaller than their large integrated competitors . . ."[10] These concessions were dictated by market share percentages showing that in 1964 Rome had 1.6 per cent and

[10] Memorandum in Opposition to Defendants' Petition for Approval of its Proposed Plan of Disposal, pp. 6, 9, note 2.

Okonite 2.5 per cent of the insulated wire and cable industry, for a combined share of only 4.1 per cent (DXR 61).[20] Moreover, these percentages actually overstate the degree of competition between the two companies since, as shown below, the two companies have fundamentally different product orientations and have never been significant competitors of each other.

The Government's assertions that Rome and Okonite rank eighth and ninth, respectively, in the wire and cable industry (J.S. 4, 16) are flatly wrong and seriously overstate the effect of the proposed sale. In fact, the record shows that the Alcoa-Rome combination ranks eighth and Okonite ninth, but Rome alone, which is all that would be transferred to Okonite, ranks no better than fifteenth (DXR 56). Moreover, when Alcoa-Rome is broken up through divestiture, Okonite will rank eighth, and approval of this sale would not alter Okonite's ranking. It would still be eighth, still less than half the size of General Cable and smaller than other industry leaders by tens of millions of dollars in annual sales (*id.*). Thus, in terms of quan-

[20] It is surprising to find the Government now seeking to rely on unofficial and incomplete trade association (NEMA) statistics based only on shipments of members (J.S. 17, note 12), rather than on the official Census data which the Government itself has heretofore used in preparing its exhibits in this case regarding concentration, market shares and market rankings in the wire and cable industry (*see, e.g.*, GX 450, 451, R. 2731). Moreover, the Government's implication that LTV regarded NEMA data as authoritative is plainly misleading. As fully explained at the hearing, LTV used the NEMA data only for purposes of "a very preliminary early study" when it had NEMA data available to it but "did not have available census data" (Tr. II, 393).

titative measures, such as market share and industry rank, the effect of the proposed sale is minimal.[21]

While both Rome and Okonite are engaged in the wire and cable business, each has carved out an essentially different role in the industry. As the court found, Okonite specializes in sophisticated high-voltage copper cables, including paper and rubber insulated products, whereas Rome is essentially a manufacturer of less sophisticated lower voltage products using thermoplastic and thermosetting insulations (J.S. 7a). Thus, while Rome is heavily in building wire and overhead products, fields in which Okonite is not engaged at all, it does not make paper insulated or telephone cable, which are among Okonite's principal products (Tr. II, 202-04, 302-06, 327, 399-401). The effect of the combination, therefore, would be primarily to enable Okonite to obtain "aluminum and copper wire and cable products which will complement those already manufactured and sold by Okonite" (J.S. 4a).

The only exception is in the power cable classification, the only Census subcategory within the nonferrous wire drawing industry in which the Rome-Okonite combined share appreciably exceeds the companies' modest combined share for the insulating industry as

[21] While the Government now seeks to impugn the official Bureau of the Census statistics on which these market rankings are calculated (J.S. 4, note 4), it made no such claim in district court, and its present contention that the Census figures improperly include shipments of certain manufacturers is entirely *dehors* the record. As noted above (note 21), the Government itself consistently utilized the official Census data in preparing the exhibits it submitted in this case.

a whole.[22] And there, because of the companies' different product orientations, this apparent overlap has little competitive significance. Thus, Okonite's three largest products, accounting for approximately 83 per cent of its total power cable shipments, were not manufactured at all by Rome (DXR 63; Tr. II, 389); and, confirming Rome's low-voltage and Okonite's high-voltage orientations, the record shows that nearly 75 per cent of Rome's power cable shipments were in the under-601 volts category, whereas nearly 70 per cent of Okonite's shipments were in the 601 volts and higher category (*id.*). In short, basic differences in product orientation and emphasis nullify the competitive significance of the mere statistical overlap indicated in the power cable classification, a fact confirmed by uncontradicted nonstatistical evidence in this proceeding.[23]

Seeking to show a "significant" competitive overlap, the Government now isolates two minor subprod-

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[22] In 1964, product overlap was found in only 4 of 10 product subcategories within the nonferrous wire drawing industry. The overlapping product classes and the Rome-Okonite combined shares in each were as follows (DXR 62):

	1964		
	Rome	Okonite	Combined
Copper and copper-base alloy wire	1.2	2.1	3.3
Communications wire and cable	0.5	0.3	0.8
Power wire and cable	2.5	12.6	15.1
Other insulated wire and cable	3.8	1.0	4.8

[23] For example, at the trial on the merits, long before a sale to Okonite was even imagined, Rome did not include Okonite in a list of its leading competitors (R. 755). Similarly, Okonite's research department periodically evaluates cables produced by its competitors. No such analysis has ever been made of cables produced by Rome (DXR 65; Tr. II, 403-04, 409, 434).

ucts within the power cable classification in which the Rome-Okonite combined percentages are slightly above 10 per cent (J.S. 16). These are "portable power cable under 601 volts" and "thermoplastic power cable over 601 volts."[24] While the Government now appears to refer to such subproducts as "smaller lines of commerce" (J.S. 17), in the district court, it was careful not to describe any of such subproducts, or even the power cable category itself, as a "line of commerce" or by any of the generally accepted synonyms, such as "relevant market," "market," or "submarket."[25] The Government's reluctance even to claim that such minor subproducts constitute separate lines of commerce within the meaning of Section 7 is understandable, for they are essentially run-of-the-mill products that do not require specialized equipment or know-how but can be and are made interchangeably on standard wire and cable machinery. Indeed, as shown by GX 800, machinery presently being used for the production of thermoplastic power cable and portable power cable at both the Rome and Okonite plants is also being used simultaneously to make a variety of other wire and cable products. In short, there is absolutely no record support for the Government's glib assumption, now advanced for the first time, that these minor subproducts constitute economically significant submarkets within the meaning of Section 7.

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[24] Rome's and Okonite's combined sales of these products in 1963 represented less than ¼ of one per cent of total wire and cable industry shipments and less than 2 per cent of the industry's total sales of power wire and cable (DXR 62, 63).

[25] Instead, the Government used such terms as "product line," "field," "area," and "category." *See* Plaintiff's Post-Hearing Memorandum in Opposition to Defendants' Petition for Approval of its Proposed Plan of Disposal, pp. 5-6.

Turning now to the Government's equally tenuous claim of "significant" potential competition, the court did not rely on "disclaimers of managerial intent" in rejecting the claim that Okonite and Rome were potential competitors in the broader wire and cable industry (J.S. 18). Rather, the court relied on an impressive array of objective evidence showing little likelihood that either company would in the foreseeable future shift away from its historic place in the wire and cable industry. As the court found (J.S. 9a),

> It is easy to say that both Rome and Okonite possess the potential to expand internally so as to become an actual competitor with the other. It is a fact, however, that Rome has been in existence since 1936 and Okonite since 1878 and neither has, over the above periods of time, developed the full product line which the Government contends is potentially available to both.

The basic reason for this is that Rome lacks the technical capability to produce paper insulated cable and the other more sophisticated products in which Okonite specializes (Tr. II, 204-05, 213-16, 304-06, 309-10, 313, 332-34, 401-02), while Okonite has little or no economic incentive to apply its sophisticated technology to producing the relatively simple building wire, lower voltage power cables and overhead products which are the main product areas of Rome (Tr. II, 304-06, 309-10, 332-34, 401-02). For these reasons, unlike the situation in *Procter & Gamble*, there is no reason to believe that the existence of Rome and Okonite "at the edge" of each other's market exerts any influence whatsoever on their respective markets. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967). Here again, the potential competition criteria outlined in

Penn-Olin sustain the district court's conclusion that Rome and Okonite are not likely to "become actual competitors in the market place" (J.S. 10a).

Finally, not only are the anticompetitive aspects of the proposed sale minor—so minor that the Government could not, in good faith, claim illegality—but there are likely to be offsetting benefits to competition. The Government stresses the importance of "maintaining independent fabricators in an industry characterized by a high degree of vertical integration". (J.S. 12, note 10), but the vigor of independent competition does not depend on a nose count of competitors but on the strength and quality of their competition. It is significant in this connection that the court found that the proposed sale would result "in a company with a full product line actually and potentially supplying . . . competition to the integrated copper and aluminum producers . . ." and that there would be "[e]conomies in operation and an increase in competition rather than a diminution thereof . . ." (J.S. 11a-12a). This conclusion is fully supported by the record which shows significant production economies in the manufacture of aluminum and copper rod (Tr. II, 306, 341), and marketing economies as the result of the broader line and larger sales volume that Rome-Okonite would have (Tr. II, 340, 426).

In sum, therefore, the relatively insignificant loss of competition suggested by the Government is likely to be more than offset by an increase in the vigor of the independent competition that Rome-Okonite would provide.

III

OTHER ERRORS CLAIMED BY THE GOVERNMENT ARE WHOLLY WITHOUT SUBSTANCE

The Government contends that the court erred in failing to inquire whether there might be some other purchaser more eligible than Okonite, i.e., that it was the court's view that "it is immaterial whether a sale to some other purchaser would pose lesser or no [competitive] problems" (J.S. 20). As the record shows, however, the court was quite prepared to "turn to somebody else besides this Okonite" if counsel could assure it that the Government would not object to a sale in which Alcoa retained a residual interest in Rome (Tr. II, 172-73). This counsel declined to do (*supra*, p. 16). Furthermore, the court dealt specifically with the Government's claim that Alcoa should be required to make a further effort to dispose of Rome to a more acceptable purchaser. Responding to this contention, the court held that "[i]f, in fact, Okonite be an eligible purchaser, further effort would seem not only to be unnecessary but detrimental to Rome's viability" (J.S. 10a-11a). As the court's opinion makes clear, this does not represent the "narrow approach" criticized by the Government (J.S. 20), but reflects consideration of the many aspects of the public interest so well served by this proposed sale, such as LTV-Okonite's ability to maintain and expand the Rome business, the lack of any retained interest on the part of Alcoa, the desirability of bringing this protracted litigation to a close, and the "speculative" nature of the "advantage which would result from further delay."

The Government also attacks two provisions in the court's divestiture decree. It contends that the so-

called upset price was too high and that the initial divestiture period of six months was too short to assure that Alcoa would find the most eligible available purchaser (J.S. 11, 20-21). These contentions are barred by the Government's failure to appeal from the court's divestiture decree. That decree was denominated a Final Judgment and qualified as a final judgment within the meaning of 15 U.S.C. § 29, notwithstanding that no definitive sale had yet been made (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 304-11 (1962)). Appeals to this Court from such final judgments "shall be taken . . . within 60 days . . ." (28 U.S.C. § 2101(b)), and failure to appeal within the time specified is a jurisdictional bar to appeal at some later time.

In any event, even if these contentions were properly before the Court, the questioned provisions were well within the equitable discretion of the district court. As noted earlier, the upset price provision was based on a similar provision in the Final Judgment accepted by the Government in the *Kaiser* case. The Government would now distinguish the *Kaiser* judgment on the ground that it was a consent decree, whereas the judgment here was entered in a litigated case (J.S. 22-23). This distinction is purely formalistic; this case and *Kaiser* are as identical as two cases can be, not only on the merits but with regard to local economic conditions that led the Government itself to conclude that an upset price would serve the public interest (*supra*, pp. 5-6). In these circumstances, the court, though not bound by the *Kaiser* judgment, was plainly entitled to consult it in formulating its decree.

Moreover, as noted above, the court did not fully adopt the *Kaiser* judgment, despite the complete iden-

tity of the two situations. It rejected emphatically the full retention provision, and, while it adopted the upset price because of its desire to avoid would-be salvagers and liquidators (J.S. 24a; Tr., February 4, 1966, p. 121), the court made clear that Alcoa was not to believe it could reject an offer merely because it did not meet the upset price. As the court said (J.S. 24a), "The [pricing] provision is intended to eliminate speculators but not to automatically exclude purchasers showing an ability and an intention to continue Rome as an active competitor in its field." This point was explained and emphasized in the court's transmittal letter to the parties:

> I realize that the [memorandum decision] may be considered to some extent as nullifying the upset price provision of the judgment. My intention is that Alcoa should report for investigation any offers from prospective purchasers which may be somewhat less than the upset price as ultimately determined. At the same time, I am trying to keep speculators, who are interested in short term profits, out of the picture.[26]

Equally untenable is the Government's claim that the court erred in establishing a period of six months in which Alcoa was to attempt to find a purchaser. The judgment expressly provides that this period would be extended to nine months (the same period

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[26] Letter from Judge Brennan, April 27, 1966. Nor is the Government factually correct in asserting that the function of the upset price is to enable Alcoa "to come out whole from its illegal acquisition of Rome . . .". That was neither its purpose nor effect. As the record shows if a sale is made at the full upset price, Alcoa will lose at least seven million dollars on its Rome venture, even after taking account of tax savings on the Rome losses (Tr. I, pp. 279-80).

used in the *Kaiser* decree) except upon a showing by defendants that there was no reasonable probability of making a sale (J.S. 31a). Moreover, expressing the belief that a sale could be accomplished within that time (Tr., February 4, 1966, pp. 59-60), the court pointed out that the purpose of the six month provision was to minimize the impact of a forced sale: "[W]here we direct this attempt to sell for whatever period of time it is, it will hurt, it will hurt the business, it will unsettle employees, it will hurt Rome . . . (*id.*, at p. 71). Clearly, the court's attempt to accommodate these interests was not an abuse of discretion, for the obligation of the court was to devise a remedy consistent with the facts "with as little injury as possible to the interests of private parties or the general public" (*Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962)).

Nor is there merit in the Government's final contention that by limiting the initial period of divestiture the court held out to Alcoa the hope that it might be permitted to retain the Rome properties, as Kaiser ultimately did in the *Kaiser-Bristol* proceeding. Refusing to adopt the automatic retention feature of the *Kaiser* judgment, the district court made it perfectly plain that he had no intention of allowing Alcoa to "escape from under my hand as easily and completely as they did [in the *Kaiser* case]" (Tr., February 4, 1966, p. 100). Any intimation that the court really intended otherwise must be rejected, as must any implication that Alcoa did not endeavor to sell Rome with utmost diligence and good faith.

CONCLUSION

For the foregoing reasons, the judgment and final order of the district court should be affirmed.

Respectfully submitted,

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